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THE CONSTITUTIONAL INFLUENCE OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL ON THE UK'S APEX COURT: INSTITUTIONAL PROXIMITY AND  
JURISPRUDENTIAL DIVERGENCE?

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Abstract:

It is often claimed that the constitutional role of the UK's apex court is enriched as a result of the experiences of the Judicial Committee of the Privy Council as interpreter of constitutions within its overseas jurisdiction. This paper considers the relationship between the House of Lords/UK Supreme Court and the Judicial Committee and its effect on the importation of external influences into the UK's legal system(s), further seeking to assess how far the *jurisprudence* of the Judicial Committee has influenced constitutional decision-making in the UK's apex court. While *ad hoc* citation of Privy Council authorities in House of Lords/Supreme Court decisions is relatively commonplace, a post-1998 enthusiasm for reliance on Judicial Committee authority – relating to (i) a 'generous and purposive' approach to constitutional interpretation and (ii) supporting the developing domestic test for proportionality – quickly faded. Both areas are illustrative of a diminishing reliance on Judicial Committee authority, but reveal divergent approaches to constitutional borrowing as the UK's apex court has

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incrementally begun to articulate a species of 'autochthonous constitutionalism' while simultaneously recognising the trans-jurisdictional qualities of the proportionality test.

**Keywords:** Judicial Committee of the Privy Council; Supreme Court; Constitutional Law; Constitutional Borrowing; Constitutional Interpretation; Proportionality.

### Introduction

Debates regarding the extent to which the UK's component jurisdictions are receptive to public law influences from elsewhere have in recent years coalesced around examination of the domestic impact of European Union laws and decisions of the European Court of Human Rights. The 'incoming tide'<sup>1</sup> of continental European influences has tended to dominate both academic and judicial discussions of 'external' influences on 'internal' legal standards. The relationships between the domestic and the international governed – on the domestic plane – primarily by the Human Rights Act (HRA) 1998 and (until its repeal in 2020) European Communities Act 1972 created umbilical connections between domestic and pan-European laws.<sup>2</sup> These linkages were amplified in practice by the EU doctrine of direct effect and the 'de facto supremacy over domestic law'<sup>3</sup> achieved by ECHR norms. In consequence, discussions

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<sup>1</sup> *H.P. Bulmer Ltd v J. Bollinger S.A.* [1974] Ch. 401, 418 (Denning MR).

<sup>2</sup> For discussion of these connections see: J.E.K. Murkens, 'The UK's Reluctant Relationship with the EU: Integration, Equivocation, or Disintegration?' and R. Masterman, 'Federal Dynamics of the UK/Strasbourg Relationship' in R. Schütze and S. Tierney, *The United Kingdom and the Federal Idea* (Oxford: Hart Publishing, 2018).

<sup>3</sup> S. Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749, 760.

relating to the receptivity of the UK legal order to constitutional ideas from elsewhere have, of late, been dominated by the domestic effect of pan-European standards.

The influence of non-EU/ECHR external norms in the UK has not, however, been entirely neglected as a topic of academic inquiry; the extent to which common law systems share constitutional characteristics<sup>4</sup> and the interplay between jurisprudential influences in human rights decision-making<sup>5</sup> both provide recurring themes to the literature concerning the extra-jurisdictional influences on the UK's legal order(s). However, amidst broader narratives surrounding the exchange and migration of constitutional ideas,<sup>6</sup> comparatively little attention has been given to the importation of influences from the almost exclusively overseas jurisdiction of the Judicial Committee of the Privy Council (JCPC). The neglect of detailed consideration of the relationship between the external and internal roles played by the Law

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<sup>4</sup> For instance: J.W. Harris, 'The Privy Council and the Common Law' (1990) 106 LQR 574; M. Elliott, J.N.E. Varuhas and S. Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart Publishing, 2018).

<sup>5</sup> See for instance: M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997); C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499; I. Cram, 'Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with reference to Terrorism Cases' (2009) 68 CLJ 118; H. Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Oxford: Hart Publishing, 2018).

<sup>6</sup> For an introduction to a now vast literature on the migration and transplantation of constitutional ideas as general patterns see: G. Halmai, 'Constitutional Transplants' in R. Masterman and R. Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2019); V. Perju, 'Constitutional Transplants, Borrowing and Migrations' in M. Rosenfeld and A. Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012).

Lords/Justices of the UK Supreme Court in constitutional adjudication is slightly puzzling.<sup>7</sup> This is for the reason that the suitability of the UK's most senior judges to adjudicate on domestic constitutional<sup>8</sup> issues – in their parallel capacity as members of the Appellate Committee of the House of Lords and UK Supreme Court – has been supported by reference to the (prior and ongoing) experiences of the JCPC in the determination of constitutional issues arising from its overseas jurisdiction. While the precise nature of the nexus between the two courts is often imprecisely defined, the potential to harness the constitutional experiences of the JCPC for domestic deployment has been a recurring feature of suggestions for reform of the UK's apex court,<sup>9</sup> was influential on the allocation – initially to the JCPC itself – of jurisdiction to determine 'devolution issues' from 1999 until 2009,<sup>10</sup> and continues to be judicially-noted in support of the burgeoning constitutional functions of the UK Supreme

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<sup>7</sup> For a partial exception see: C. Harlow, 'Export, import. The ebb and flow of English Public Law' [2000] PL 240.

<sup>8</sup> Primarily, for the purposes of this essay, in adjudication pursuant to the HRA 1998 and devolution statutes.

<sup>9</sup> In the early 1970s, Louis Blom-Cooper and Gavin Drewry had suggested – as arguments in favour of a UK Bill of Rights (and perhaps even written constitution) began to gather momentum – that, '[t]he experience of their Lordships in handling constitutional problems of the Commonwealth may yet provide them with a significant insight into such problems nearer to home' (L. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Oxford: Clarendon Press, 1972), p.105).

<sup>10</sup> As noted by, for instance: Robert Reed QC, 'Devolution and the Judiciary' in Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998), p.25; A. Le Sueur, 'What is the Future for the Judicial Committee of the Privy Council?' (London: Constitution Unit, 2001), pp.11-14; S. Shetreet and S. Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2<sup>nd</sup> ed) (Cambridge: Cambridge University Press, 2013), p.44-45; C. McCorkindale, A. McHarg and P. Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Review* 289.

Court.<sup>11</sup> In the light of this, the interrelationship between decisions of the JCPC and the Appellate Committee of the House of Lords/Supreme Court in the sphere of constitutional adjudication is worthy of more detailed consideration.<sup>12</sup>

This piece considers the relationship between the House of Lords/UK Supreme Court and the Judicial Committee and its effect on the importation of external influences into the UK's legal system(s) before testing the claim that the UK apex court's ability to determine constitutional issues is somehow enriched by the experiences of the JCPC. The latter point is considered via an assessment of the extent to which the *jurisprudence* of the JCPC has exerted an influence on constitutional decision-making in the UK's apex court. First, it will be argued that while *ad hoc* citation of Judicial Committee decisions in judgments of the House of Lords/Supreme Court is a common occurrence, there is little evidence of a sustained pattern of reliance on JCPC authorities in the context of domestic constitutional adjudication. Second, evidence of a post-1998 enthusiasm for reliance on Judicial Committee authority in two fields – (i) relating to the adoption of a 'generous and purposive' approach to constitutional interpretation and (ii) supporting the developing domestic test for proportionality – will be examined. Both areas will be argued to be illustrative of a diminishing reliance on Judicial Committee authority, but revealing of divergent approaches to constitutional borrowing as the UK's apex court has incrementally begun to articulate a species of 'autochthonous

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<sup>11</sup> Baroness Hale, 'Devolution and the Supreme Court – 20 Years On' (Speech to the Scottish Public Law Group, 14 June 2018).

<sup>12</sup> For a general introduction see: K. Keith, 'The Interplay with the Judicial Committee of the Privy Council' in L. Blom-Cooper, B. Dickson and G. Drewry, *The Judicial House of Lords, 1876-2009* (Oxford: Oxford University Press, 2009).

constitutionalism'<sup>13</sup> while simultaneously recognising the trans-jurisdictional qualities of the proportionality test.

### **The Judicial Committee of the Privy Council and the UK Apex Court**

The Judicial Committee was formally established by the Judicial Committee Act 1833 and in its pomp was estimated to serve as final appellate tribunal to a quarter of the world's population.<sup>14</sup> Through serving to uphold the 'supremacy of imperial statute'<sup>15</sup> to its primary latter day role as interpreter of the written constitutions of various Caribbean states, its jurisdiction has been marked by a close engagement with constitutional issues.<sup>16</sup> As a result of this constitutional jurisdiction – coupled with its innovative (but little used) reference procedure<sup>17</sup> – the Judicial Committee has been described as an 'embryonic ... constitutional court.'<sup>18</sup> Its extensive multi-state jurisdiction also served as a template of sorts for the model

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<sup>13</sup> S. Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism' [2015] PL 394.

<sup>14</sup> P. O'Connor, *The Constitutional Role of the Privy Council and Prerogative* (London: Justice, 2009), p.16.

<sup>15</sup> D. B Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833-1986* (Manchester University Press, 1987), p.15.

<sup>16</sup> L. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Oxford: Clarendon Press, 1972), p.104.

<sup>17</sup> Judicial Committee Act 1833, s.4 (and, for instance, *In the matter of the Baronetcy of Pringle of Stichill* [2016] UKPC 16).

<sup>18</sup> P. O'Connor, *The Constitutional Role of the Privy Council and Prerogative* (London: Justice, 2009), p.17.

of supranational adjudication that came to be seen as one of the late-twentieth century hallmarks of constitutionalisation.<sup>19</sup>

However, since at least<sup>20</sup> the Statute of Westminster 1931, the jurisdiction of the JCPC has been steadily receding.<sup>21</sup> Appeals from Canada and India were ended in 1949, with Australia, Hong Kong and New Zealand following in 1986, 1997 and 2003 respectively. In addition to a residual specialist domestic jurisdiction,<sup>22</sup> the Judicial Committee continues to hear appeals from Crown Dependencies<sup>23</sup> and Overseas Territories,<sup>24</sup> as well as from a number of Commonwealth – mostly Caribbean – states.<sup>25</sup> In spite of its diminished geographical jurisdiction, the Judicial Committee maintains a not insignificant case-load, handing down decisions in some 40 appeals in 2018, and 53 appeals in 2019.<sup>26</sup>

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<sup>19</sup> See N. Bentwich, 'The Judicial Committee of the Privy Council as a Model of an International Court for Human Rights' (1948) 2 ILQ 392; T. Robinson and A. Bulkan, 'Constitutional Comparisons by a Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights' (2017) 80 MLR 379.

<sup>20</sup> Viscount Haldane described the Judicial Committee, in 1922, as a 'disappearing body' (Viscount Haldane of Cloan, 'The Work for the Empire of the Judicial Committee of the Privy Council' (1922) 1 CLJ 143, 154).

<sup>21</sup> On which see: D.B. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833-1986* (Manchester University Press, 1987).

<sup>22</sup> In relation to, for instance, appeals from the disciplinary committee of the Royal College of Veterinary Surgeons (s.17(1) Veterinary Surgeons Act 1966); disputes arising under the House of Commons Disqualification Act 1975 (s.7); appeals from Prize Courts; appeals from the High Court of Chivalry.

<sup>23</sup> Jersey, Guernsey and the Isle of Man.

<sup>24</sup> Including, the British Virgin Islands, Cayman Islands, Gibraltar and the Turks and Caicos Islands.

<sup>25</sup> Including, the Bahamas, Grenada and Jamaica.

<sup>26</sup> At the turn of the 21<sup>st</sup> century the JCPC heard approximately 70 cases per year (A. Le Sueur, *What is the future for the Judicial Committee of the Privy Council?* (London: Constitution Unit, 2001), p.4).



The JCPC is at once internal and external to the UK's constitutional order; its benches are populated almost exclusively by Justices of the UK Supreme Court, but the larger part of its diet of cases originate overseas. Though it sits – predominantly<sup>27</sup> – in London, '... the JCPC is not a court of any part of the United Kingdom'<sup>28</sup> and in common with the decisions of other foreign courts, decisions of the JCPC are regarded in the context of adjudication in the House of Lords/Supreme Court as being strongly persuasive, though not binding. In practice the domestic influence of JCPC decisions has been an area of niche, or only occasional,<sup>29</sup> concern to researchers.<sup>30</sup> But the general relationship between decisions of the Supreme Court and the Judicial Committee has recently been restated in *Willers v Joyce*:

First, given that the JCPC is not a UK court at all, decisions of the JCPC cannot be binding on any judge of England and Wales, and, in particular, cannot override any

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<sup>27</sup> The Judicial Committee has occasionally convened overseas, including in the Bahamas and Mauritius. For an assessment of the JCPC's efforts to address its remoteness from much of its jurisdiction see: P. Mitchell, 'The Privy Council and the Difficulty of Distance' (2016) 36 OJLS 26.

<sup>28</sup> *Willers v Joyce* (2) [2016] UKSC 44, [10]. See also: *Alexander E Hull and Co v McKenna* [1926] IR 402, 403-404.

<sup>29</sup> For instance in relation to the Judicial Committee of the Privy Council (*Attorney General for Jersey v Holley* [2005] UKPC 23; [2005] 2 AC 580) 'overruling' the Appellate Committee of the House of Lords (*R v Smith (Morgan James)* [2001] 1 AC 146) on an appeal relating to the law of provocation. The Judicial Committee decision was subsequently adopted as authoritative in *R v James* [2006] EWCA Crim 14; [2006] 1 All ER 759. On which see: J. Elvin, 'The Doctrine of Precedent and the Provocation Defence: a Comment on *R v James*' (2006) 69 MLR 819.

<sup>30</sup> Tyrrell's excellent recent study – H. Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Oxford: Hart Publishing, 2018) – excludes Judicial Committee of the Privy Council decisions from its dataset (p.21).

decision of a court of England and Wales (let alone a decision of the Supreme Court or the Law Lords) which would otherwise represent a precedent which was binding on that judge. Secondly, given the identity of the Privy Counsellors who sit on the JCPC and the fact that they apply the common law, any decision of the JCPC, at least on a common law issue, should, subject always to the first point, normally be regarded by any Judge of England and Wales, and indeed any Justice of the Supreme Court, as being of great weight and persuasive value. Thirdly, the JCPC should regard itself as bound by any decision of the House of Lords or the Supreme Court – at least when applying the law of England and Wales. That last qualification is important: in some JCPC jurisdictions, the applicable common law is that of England and Wales, whereas in other JCPC jurisdictions, the common law is local common law, which will often be, but is by no means always necessarily, identical to that of England and Wales.<sup>31</sup>

The Judicial Committee is staffed – overwhelmingly so in practice<sup>32</sup> – by the judges of the UK's domestic apex court. Since 2009, the JCPC has also been physically accommodated

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<sup>31</sup> *Willers v Joyce* (2) [2016] UKSC 44, [12]. The specific element of the judgment concerned the circumstances in which the JCPC might 'not only decide that [an] earlier decision of the House of Lords or Supreme Court, or of the Court of Appeal, was wrong, but also can expressly direct that domestic courts should treat the decision of the JCPC as representing the law of England and Wales' [19]. On the latter point see: P. Mirfield, 'A Novel Theory of Privy Council Precedent' (2017) 133 LQR 1.

<sup>32</sup> *Willers v Joyce* (2) [2016] UKSC 44, [11]: '... either all or four of the five Privy Counsellors who normally sit on any appeal will almost always be Justices of the Supreme Court. This reflects the position as it has been for more than 100 years, following the Appellate Jurisdiction Act 1876, which created the Lords of Appeal in Ordinary (ie the Law Lords), who thereafter constituted the majority of the Privy Counsellors who sat in the JCPC, until the creation of the Supreme Court in October 2009.'

within the same premises as the UK Supreme Court.<sup>33</sup> This proximity bears upon the relationship between the two courts in a number of ways. The workload implications of apex court judges populating panels in the Judicial Committee are occasionally commented upon.<sup>34</sup> But the overlapping membership of the two courts also diminishes the external element of the Judicial Committee's influence. As Bell has suggested, the common membership of the two Courts has led to a perception that JCPC decisions are treated in the Supreme Court 'like obiter dicta in an English case, rather than the interpretation of a foreign law.'<sup>35</sup> Additionally, the importation of external influences originating in Judicial Committee decisions themselves taken by Law Lords/Justices of the Supreme Court represents a relatively surreptitious form of jurisprudential migration, less likely to attract controversy than the importation of authorities originating in an overseas court populated by a majority of overseas judges.<sup>36</sup>

### **The Claimed Benefit to Constitutional Adjudication in the UK Apex Court**

The 1998 devolution legislation positioned the JCPC as the legal arbiter of devolution disputes. In part, this decision was the result of a perceived deficiency of the UK's then apex court; the Appellate Committee of the House of Lords – by virtue of its position as a component of the

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<sup>33</sup> Prior to 2009, the Judicial Committee sat in the Council Chamber at No.9 Downing Street.

<sup>34</sup> B. Dickson, 'The Lords of Appeal and their Work, 1967-1996' in P. Carmichael and B. Dickson, *The House of Lords: Its Parliamentary and Judicial Roles* (Oxford: Hart Publishing, 1999), pp.150-153; A. Le Sueur, *What is the future for the Judicial Committee of the Privy Council?* (London: Constitution Unit, 2001), pp.11-14; M. Peel and J. Croft, 'Privy Council Hampers Supreme Court', *Financial Times*, 20 September 2009.

<sup>35</sup> J. Bell, 'Comparative Law in the Supreme Court, 2010-11' (2012) 1(2) *Cambridge Journal of International and Comparative Law* 20, 23 (commenting on the use in *R v Chaytor* of two JCPC decisions from Sri Lanka and New Zealand).

<sup>36</sup> A point inelegantly made by Lord Hoffmann in, 'The Universality of Human Rights' (2009) 125 LQR 416.

UK legislature – was felt to be an inapt mediator of disputes concerning the legislative relationships between the devolved bodies and Westminster.<sup>37</sup> (This institutional obstacle to devolution cases being heard by the UK's apex court was removed, in 2009, by the replacement of the Appellate Committee of the House of Lords with the UK Supreme Court.<sup>38</sup>) However, characteristics of the Judicial Committee were argued to weigh in favour of it functioning as a proto-constitutional court in relation to devolution disputes. The allocation to the JCPC of this new adjudicatory power was at least partially justified by reference to the Judicial Committee's existing (and prior) jurisdiction in relation to constitutional matters. In 1998 the Labour government supported the allocation of the devolution jurisdiction to the JCPC in the following terms:

The Judicial Committee acts now as the final constitutional court of appeal for various Commonwealth dependencies and colonies (sic) ... As it already has that role, we thought it appropriate to use its experience of handling cases that raise constitutional issues.<sup>39</sup>

Others were in agreement; Lord Selkirk, for instance, noted during the House of Lords debates on the Scotland Bill that the Judicial Committee's 'wealth of constitutional experience'<sup>40</sup>

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<sup>37</sup> A. Le Sueur, *What is the Future for the Judicial Committee of the Privy Council?* (London: Constitution Unit, 2001), p.11

<sup>38</sup> Constitutional Reform Act 2005, s.40 and sch.9.

<sup>39</sup> Hansard, HC Debs, Vol.305, Col.927 (3<sup>rd</sup> February 1998), Win Griffiths MP (Parliamentary Under Secretary in the Welsh Office).

<sup>40</sup> Hansard, HL Debs, Vol.593, Cols.1964-1965 (28<sup>th</sup> October 1998) (Lord Selkirk of Douglas).

rendered it an appropriate arbiter of competence disputes arising under the (then proposed) devolution legislation.

Judges have also endorsed the positive benefits that might derive from drawing domestically on the constitutional experiences of the Judicial Committee. Lord Reed (as he is now) wrote in 1998 that the decision to allocate the newly-formed devolution jurisdiction to the JCPC was 'readily understandable' on the basis of its 'already developed experience of constitutional issues referred to it from the courts of several Commonwealth countries.'<sup>41</sup> In 2018, Lady Hale stated – in the context of a discussion of how the devolution jurisdiction has transformed the UK Supreme Court into something approximate to a 'genuinely constitutional court' – that '[a]s members of the Judicial Committee of the Privy Council, we were familiar with this role in the context of the Commonwealth Constitutions with which we have to deal.'<sup>42</sup>

However, as these judicial endorsements illustrate, the specific nature of the benefit to be derived from the linkage to the JCPC is unclear. Both Lord Reed and Lady Hale suggest the positive advantage of drawing on the body of constitutional authority developed over time by the Judicial Committee. Lady Hale – using the present tense – additionally highlights the direct experiential benefit resulting from Justices of the Supreme Court sitting as members of the JCPC. Either way, the sense is given that the linkage between the two courts and their two jurisdictions – the external (or international) and the internal (or domestic) – somehow positively impacts upon decision-making in the UK top court.

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<sup>41</sup> Robert Reed QC, 'Devolution and the Judiciary' in Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998), p.25.

<sup>42</sup> Baroness Hale, 'Devolution and the Supreme Court – 20 Years On' (Speech to the Scottish Public Law Group, 14 June 2018).

There is a basically sound logic underpinning this suggested connection between the Law Lords'/Supreme Court Justices' external and internal roles. Indeed, the judges' contemporaneous membership of both courts may well provide insights into the context and intricacies of JCPC appeals that they could not claim in relation to domestic deployment of other external authorities. But, as Ewing has argued,<sup>43</sup> claims that the external experiences and/or case-law of the Privy Council can straightforwardly be transposed into the domestic constitution simultaneously have something of an air of unreality to them. If the claimed benefit is to be found in the ability of the Law Lords/Justices of the Supreme Court to draw upon the accumulated constitutional jurisprudence built up by the JCPC, then it is unclear what – beyond the shared memberships of the two courts – would privilege the position of Judicial Committee case-law vis-à-vis the jurisprudence of (say) other top courts in the common law world. If the benefit lies in the judges' participation in the adjudication of overseas constitutional cases in the JCPC, then the contemporary experiential benefits to be obtained should be understood as reflecting the JCPC's diminished and (comparatively) narrow contemporary jurisdiction. Indeed, commentators observed, at the point at which competence questions arising under the devolution legislation were allocated to the JCPC, that 'the Judicial Committee had not adjudicated on "division of powers" questions between different parts of a federation since Canada stopped sending appeals in 1949'<sup>44</sup> and that the broader constitutional jurisdiction of

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<sup>43</sup> Cf. K.D. Ewing, 'A Bill of Rights: Lessons from the Privy Council' in W. Finnie, C. Himsworth, and N. Walker, *Edinburgh Essays in Public Law* (Edinburgh: Edinburgh University Press, 1991), p.231: '... there is a superficial attraction in the simplistic assumption that with this experience the English courts must be well equipped to deal with a Bill of Rights which would flourish under the guidance of English judges.'

<sup>44</sup> A. Le Sueur, *What is the Future for the Judicial Committee of the Privy Council?* (London: Constitution Unit, 2001), p.11.

the Court had declined so much as to be negligible.<sup>45</sup> And if the claimed benefit is to be found in the contemporaneous membership of the two courts then it is likely to give rise to linkages which will be imperceptible through the lens of decided cases. In the absence of access to the judges themselves the extent to which the judges' experiences as members of the JCPC anecdotally inform their approach to decision-making in the UK's apex court will remain largely invisible.<sup>46</sup> Though, even in the context of research drawing on interviews with the Supreme Court Justices, Tyrrell notes the 'unseen' role played by reference to foreign laws in domestic adjudication.<sup>47</sup> For these reasons, the remainder of this piece focuses on the visible aspect of the relationship between the two courts: the extent to which JCPC decisions exercise discernible influence on constitutional decision-making in the UK's apex court.

### **Incidental References to Judicial Committee Decisions in the UK Apex Court**

By contrast with those areas of the law in which statute has mandated consideration of external authorities, UK apex court judges are not obligated to consider JCPC decisions. Incidental

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<sup>45</sup> R. Hazell, 'Reinventing the Constitution: Can the State Survive?' CIPFA/Times Lecture, 4 November 1998.

<sup>46</sup> The 'sociological' dimensions of the Law Lords' and Supreme Court Justices' decision-making processes are illuminated in Alan Patterson's works *The Law Lords* (London: Macmillan, 1982) and *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart, 2013). The interplay between the roles of the Law Lords in the Appellate and Judicial Committees is touched upon in Paterson's earlier work, *The Law Lords*, but his coverage focused on the interplay between the judges themselves rather than between the courts they populate. While Patterson's later work – *Final Judgment* – also considers broader 'dialogues' between the Supreme Court and its counsel, other courts, and government, this particular dialogue – the dialogue between the two courts served by the Justices of the Supreme Court – is not considered.

<sup>47</sup> H. Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Oxford: Hart Publishing, 2018), p.196.

citation of Judicial Committee decisions in House of Lords/Supreme Court judgments raising constitutional questions is nonetheless commonplace.

External influences are occasionally visible in UK apex court cases concerning constitutional principles, where JCPC decisions have provided contextual information or have otherwise infiltrated decisions concerning the domestic variants of those principles.<sup>48</sup> In *Jackson v Attorney-General*,<sup>49</sup> Lord Steyn spent some time considering the JCPC's case law on the legal limitations which might operate in respect of legislatures, citing *Attorney-General of New South Wales v Trethowan*,<sup>50</sup> *Bribery Commissioner v Ranasinghe*,<sup>51</sup> and a number of cases from South Africa in order to animate his discussion of Parliament as including both 'static and dynamic' elements.<sup>52</sup> Lord Steyn also punctuated his speech in *Anderson* with reference to those 'House and Lords and Privy Council'<sup>53</sup> decisions emphasising that the 'the separation of powers between the judiciary and the legislative and executive branches of

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<sup>48</sup> In relation to, for instance, the doctrine of separation of powers (*Hinds v The Queen* [1977] AC 195 (cited in eg *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407, 526)); dualism (*Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PC 22 and *Higgs v Minister of National Security* [2000] 2 AC 228 (cited in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [33] and [167]); and the parameters of statutory interpretation by judges (*Union Colliery Co. of British Columbia Ltd v Bryden* [1899] AC 580 (cited in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557)).

<sup>49</sup> *Jackson v Attorney-General* [2006] UKHL 56.

<sup>50</sup> *Attorney-General of New South Wales v Trethowan* [1932] AC 526.

<sup>51</sup> *Bribery Commissioner v Ranasinghe* [1965] AC 172.

<sup>52</sup> *Jackson v Attorney-General* [2006] UKHL 56, [81].

<sup>53</sup> The latter being: *Attorney General for Australia v The Queen* [1957] AC 288, 315; *Liyanage v The Queen* [1967] 1 AC 259, 291; *Hinds v The Queen* [1977] AC 195.



government is a strong principle of our system of government.'<sup>54</sup> In *Bancoult (No.2)*<sup>55</sup> various Law Lords engaged with the JCPC authorities relating to the power to legislate for the 'peace, order and good government' of a territory.<sup>56</sup> And more recently, in the Supreme Court's unanimous *Miller/Cherry* decision, the Privy Council decision in *Bobb v Manning*<sup>57</sup> was cited in order to illustrate that the concept of governmental accountability to Parliament lay at the 'heart of Westminster democracy'.<sup>58</sup>

The House of Lords/Supreme Court has also utilised JCPC decisions in order to evidence more specific points of law. In *R (Wellington) v Secretary of State for the Home Department*<sup>59</sup> – a case concerning the proposed extradition of the claimant to the United States in order to stand trial for various offences, including murder in the first degree (which was punishable either by a death sentence, or life imprisonment) – the House of Lords relied upon the JCPC decision in *Reyes v The Queen*<sup>60</sup> in order to illustrate that a mandatory death sentence should be regarded as 'inhuman and degrading treatment' (and as such, a violation of Article 3 ECHR).<sup>61</sup> In *R (Miller) v Secretary of State for Exiting the European Union*,<sup>62</sup> a number of

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<sup>54</sup> *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837, [39].

<sup>55</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 51; [2009] 1 AC 453, [50], [99], [125].

<sup>56</sup> Including: *Ibraheem v The Queen* [1964] AC 900; *Liyanage v The Queen* [1967] 1 AC 259.

<sup>57</sup> *Bobb v Manning* [2006] UKPC 22, [13].

<sup>58</sup> *R (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, [46].

<sup>59</sup> *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; [2009] 1 AC 335.

<sup>60</sup> *Reyes v The Queen* [2002] 2 AC 235.

<sup>61</sup> *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; [2009] 1 AC 335, [63].

<sup>62</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

Judicial Committee decisions were cited in support of the Court's majority judgment: these included *The Zamora*<sup>63</sup> (in support of the proposition that 'the exercise of [the Crown's administrative] powers must be compatible with legislation and the common law'<sup>64</sup>); and *Madzimbamuto v Lardner Burke*<sup>65</sup> (in support of the notion that the courts will not directly enforce political/constitutional conventions).<sup>66</sup>

It is reasonably clear that House of Lords/Supreme Court citation of Judicial Committee decisions is both relatively common, and relatively *ad hoc*. While routine and often rigorous engagement with ECHR and EU authorities is characteristic of adjudication under the HRA and ECA, the citation of JCPC authorities in constitutional cases is rather more intermittent. A number of significant post-1998 constitutional cases decided by the House of Lords/Supreme Court include no reference to overseas decisions of the JCPC:<sup>67</sup> *AXA v HM Advocate*;<sup>68</sup> *HS2*;<sup>69</sup> *R (Evans) v Attorney-General* and *R (UNISON) v Lord Chancellor*<sup>70</sup> can be counted within this category. In one sense this is unsurprising, for the reason that the primary focus of the decisions could be argued to be the interpretation and implications of UK statute law. But each of the above cases also arguably deals with matters of broader constitutional principle; in particular *AXA* addresses the sort of 'federal' dispute which provided the initial justification for allocating

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<sup>63</sup> *The Zamora* [1916] 2 AC 77.

<sup>64</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [45].

<sup>65</sup> *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645

<sup>66</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [144].

<sup>67</sup> Although pre-2009 JCPC decisions on devolution do feature (eg *Anderson v Scottish Ministers* [2001] UKPC D5; [2003] 2 AC 602 is cited in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868).

<sup>68</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868.

<sup>69</sup> *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324.

<sup>70</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

devolutionary competence disputes to the JCPC, while in *Evans* the lead judgment is explicit in its efforts to realise the rule of law as a principle which reaches beyond the municipal.<sup>71</sup> As a result, the sense is given of an absence of methodical citation of Judicial Committee jurisprudence on constitutional issues, and of a relatively sporadic approach even in those fields where comparisons might be drawn (which itself in turn – and as the above examples from Lord Steyn may illustrate – might be judge-dependent<sup>72</sup>).

### **Patterns of Diminishing Influence?**

Limited evidence is however available of recurrent references to certain JCPC cases – or lines of JCPC authority – demonstrating an initial post-1998 influence on domestic judicial reasoning, giving way to a diminishing effect over time. This pattern can be observed in two fields in particular: the UK apex court's approach to the interpretation of constitutional measures and its approach to the parameters of the test for proportionality.

#### *'Generous and purposive' interpretation:*

##### (a) Interpreting Rights Instruments:

Following the full implementation of the Human Rights Act in October 2000 a number of House of Lords decisions drew parallels with the experiences of the JCPC in interpreting *constitutional* bills of rights, suggesting that the HRA 1998 ought to be afforded a 'generous

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<sup>71</sup> *R (Evans) v Attorney General* [2015] UKSC 21, [51].

<sup>72</sup> H. Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Oxford: Hart Publishing, 2018), pp.195-198.

and purposive'<sup>73</sup> interpretation in order that individuals fully benefit from its protections.<sup>74</sup> In *R v Director of Public Prosecutions, ex parte Kebeline*, Lord Hope said:

In *Attorney General of Hong Kong v Lee Kwong-kut*<sup>75</sup> ... Lord Woolf referred to the general approach to the interpretations of constitutions and bills of rights indicated in previous decisions of the Board, which he said were equally applicable to the Hong Kong Bill of Rights Ordinance 1991. He mentioned Lord Wilberforce's observation in *Minister of Home Affairs v Fisher*<sup>76</sup> ... that instruments of this nature call for a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedoms referred to, and Lord Diplock's comment in *Attorney General of The Gambia v Momodou Jobe*<sup>77</sup> ... that a generous and purposive construction is to be given to that part of a constitution which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled. The same approach *will now have to be applied in this country* when issues are raised under the 1998 Act about the compatibility of domestic legislation and of acts of public authorities with the fundamental rights and freedoms which are enshrined in the Convention.<sup>78</sup>

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<sup>73</sup> *Minister of Home Affairs v Fisher* [1980] AC 319, 329 (Lord Wilberforce). See also: *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 375; *Brown v Stott* [2003] 1 AC 681, 703.

<sup>74</sup> Lord Steyn, 'The New Legal Landscape' [2000] EHRLR 549, 550.

<sup>75</sup> *Attorney General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 966.

<sup>76</sup> *Minister of Home Affairs v Fisher* [1980] AC 319, 328.

<sup>77</sup> *Attorney General of The Gambia v Momodou Jobe* [1984] AC 689, 700.

<sup>78</sup> *R. v Director of Public Prosecutions, Ex p. Kebeline* [2000] 2 AC 326 (emphasis added).

The so-called 'radical' approach to interpretation<sup>79</sup> – initially evidenced in *R v A (No.2)* – drew on this expansive understanding of the Act, conceiving of the courts' powers under s.3(1) HRA as potentially remedial of all inconsistencies other than those explicitly 'stated in terms' by statute. This approach in turn viewed the declaration of incompatibility as a 'measure of last resort' to be avoided 'unless ... plainly impossible to do so.'<sup>80</sup>

While the radical approach to interpretation under s.3(1) HRA was contextualised by the Privy Council experiences of the Law Lords,<sup>81</sup> and by reference to the 'weaker'<sup>82</sup> provisions of the New Zealand Bill of Rights Act 1990, it nonetheless sat uneasily with the constitutional 'balance'<sup>83</sup> that the adoption of the Human Rights Act's specific model had sought to preserve. Maximisation of the freedoms protected via the HRA through such judicially-focused (and directed) means minimised the co-operative elements of the Act in a way which did not find wholesale support within the senior judiciary.<sup>84</sup> As Lord Rodger cautioned:

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<sup>79</sup> A. Kavanagh, 'Unlocking the Human Rights Act: The "Radical" Approach to s.3(1) Revisited' [2005] EHRLR 259.

<sup>80</sup> *R v A (No.2)* [2002] 1 AC 45, [44] (Lord Steyn).

<sup>81</sup> *R v A (No.2)* [2002] 1 AC 45, [38], [44] (Lord Steyn).

<sup>82</sup> *R v A (No.2)* [2002] 1 AC 45, [44] (Lord Steyn).

<sup>83</sup> Lord Irvine of Lairg QC, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] PL 308.

<sup>84</sup> See for instance: *R v A (No.2)* [2002] 1 AC 45, [108] (Lord Hope); *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837, [30] (Lord Bingham).

... the Privy Council decisions may not provide a sure guide to the approach to be adopted under section 3(1). They are concerned with constitutions that are the supreme law, with which other laws must conform on pain of invalidity.<sup>85</sup>

The expansive view to s.3(1) therefore relatively quickly ceded ground to a more contextual approach under which the dividing line between interpretation and law-making will be contingent on a range of issues, including – but not limited to – linguistic matters,<sup>86</sup> perceived constitutional competence,<sup>87</sup> the impact of the proposed interpretation on the impugned legislation,<sup>88</sup> the weight to be attached to the relevant/applicable Strasbourg jurisprudence<sup>89</sup> and so on.<sup>90</sup>

Human rights adjudication has also seen the apex court repeatedly refer to Lord Sankey's description of the British North American Act 1867 as a 'living tree capable of growth and expansion within its natural limits.'<sup>91</sup> In *Brown v Stott*, Lord Bingham, noted that, '[a]s an important constitutional instrument,' the ECHR 'is to be seen as a "living tree capable of growth and expansion within its natural limits" ... but those limits will often call for very careful consideration.'<sup>92</sup> While 'living tree' interpretation is primarily taken to address the

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<sup>85</sup> *R v A (No.2)* [2002] 1 AC 45, [120].

<sup>86</sup> *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467.

<sup>87</sup> *Bellinger v Bellinger* [2003] 2 AC 467.

<sup>88</sup> *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837.

<sup>89</sup> *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 AC 269.

<sup>90</sup> For what remains the most sustained examination of these issues see: A. Kavanagh, *Constitutional Review under the UK's Human Rights Act* (Cambridge: Cambridge University Press, 2009).

<sup>91</sup> *Edwards v Attorney-General for Canada* [1930] AC 124, 136.

<sup>92</sup> *Brown v Stott* [2003] 1 AC 681, 703.

capacity for understandings of constitutional instruments to develop over time, it is the 'natural limits' of evolutive interpretation that have been emphasised in subsequent decisions. Reference to the 'living tree' approach has – instead of supporting expansive interpretations of the Convention rights in decisions under the HRA – been used as a means of cautioning against an expansionist approach. As such, Lord Hope in both *N v Home Secretary*<sup>93</sup> and *Ambrose v Harris*<sup>94</sup> – stressed that the 'natural limits' to the Convention rights were to be primarily found in the jurisprudence of the European Court of Human Rights. Reliance on JCPC authority was, again, tempered by the developing approach to the interpretation of the requirements of the HRA in order to reflect the HRA's explicit linkage to a specific body of extra-territorial jurisprudence.<sup>95</sup>

Both strands of Judicial Committee authority on constitutional interpretation provided an initial source of inspiration for the apex court's approach to HRA adjudication, but were reasonably quickly jettisoned, or qualified, as a result of the emerging judicial consensus on the contours of legitimate s.3(1) interpretation,<sup>96</sup> and the solidification of the Convention jurisprudence as the dominant (external) judicial authority on the meaning and application of the HRA rights.<sup>97</sup> The former reflects both the sub-Constitutional status of the HRA and the tension between the judicio-centric 'generous and purposive' approach to constitutional rights instruments and the co-operative, and statutory, nature of the HRA; the latter – though

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<sup>93</sup> *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 AC 296, [22]-[25].

<sup>94</sup> *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435, [19].

<sup>95</sup> Section 2(1) HRA.

<sup>96</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557.

<sup>97</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. On the broader role of foreign jurisprudence in HRA adjudication see: R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act (2005) 54 ICLQ 907, 921-923.

'internationalist' in its focus on giving effect to the requirements of the ECHR as expressed in the jurisprudence of the Strasbourg court<sup>98</sup> – reflected the HRA's purpose of giving domestic effect to the pre-existing catalogue of rights contained in the ECHR.

(b) Devolution:

A devolutionary counterpart to JCPC-supported expansive readings of the HRA can be found in the decision of the House of Lords in *Robinson v Secretary of State for Northern Ireland*.<sup>99</sup> In *Robinson*, Lord Bingham found that the Northern Ireland Act 1998 was 'in effect a constitution' and that it followed that its provisions 'should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.'<sup>100</sup> Similarly, Lord Hoffmann found that the Act should not be interpreted 'rigidly' and that giving effect to the broader political agreement it rested upon 'required ... flexibility.'<sup>101</sup> In so finding, a majority of the Law Lords was able to dismiss a challenge to the validity of elections to the positions of First Minister and Deputy First Minister on the basis that they had fallen outside the statutory time limit apparently laid down by (the then) s.16 Northern Ireland Act 1998. Lord Bingham cited *no authority* in support of adopting the 'generous and purposive' interpretation of the Northern Ireland Act; this both illustrates the occasional difficulty – alluded to above and evident in broader patterns of

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<sup>98</sup> B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013), ch.3. Cf. *In Re McKerr* [2004] UKHL 12, [65] (Lord Hoffmann).

<sup>99</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

<sup>100</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

<sup>101</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [32].



constitutional borrowing<sup>102</sup> – of tracing the importation by the Law Lords of authorities articulated by their JCPC alter egos, and also suggests a degree of ubiquity to the notion that constitutional instruments are entitled to a expansive, rather than, textualist interpretation. Yet, just as in the context of HRA adjudication, the 'generous and purposive' approach has failed to embed.

Subsequent decisions considering the interpretation of the Scotland and Government of Wales Acts have indicated an intermediate approach, which seeks to reconcile the distinctive, democratic, characteristics of the devolved bodies with their heritage as creatures of legislation. As such, the Scottish Parliament is judicially-regarded as being no ordinary statutory body, but a 'democratically elected legislature'<sup>103</sup> enjoying 'plenary powers'<sup>104</sup> subject to the limitations stated in the Scotland Act<sup>105</sup> and 'constitutional review' on the basis of the common law principle of legality.<sup>106</sup> Devolution jurisprudence post-*Robinson* illustrates two limitations to analogising the devolution legislation and written constitutions. First, as Lord Reed bluntly put it in the decision of the Inner House in *Imperial Tobacco*: 'The Scotland Act is *not* a constitution, but an Act of Parliament.'<sup>107</sup> Second, while the devolution Acts are regarded as

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<sup>102</sup> McCrudden highlights the 'distinction between explicit and non-explicit reference to judicial decisions in other jurisdictions' (C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499, 511).

<sup>103</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, [145].

<sup>104</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, [147].

<sup>105</sup> Scotland Act 1998, s.29(2).

<sup>106</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, [149]-[153].

<sup>107</sup> *Imperial Tobacco* [2012] CSIH 9, [71] (emphasis added).

constitutional statutes at common law,<sup>108</sup> this status 'cannot be taken, in itself, as a guide to its interpretation. The statute must be interpreted like any other statute.'<sup>109</sup>

The balance to be struck between the character of the Scottish Parliament as a representative assembly and its status as the direct product of Westminster statute was outlined by the unanimous Supreme Court in the reference on the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* in the following terms:

The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving a consistent and predictable interpretation of the Scotland Act so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.<sup>110</sup>

As such, the courts have sought to recognise – within the frameworks provided by the devolution legislation – the distinctive constitutional status of the devolutionary arrangements, *without* sanctioning general departures from the legislative intent-driven techniques of interpretation to be applied in their application. They have done so without adopting the 'generous and purposive' interpretative approach to constitutional instruments often visible in

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<sup>108</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151, [60]-[64].

<sup>109</sup> *Imperial Tobacco v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153, [15]; *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43, [6].

<sup>110</sup> *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [12].

Judicial Committee decisions. In consequence, *Robinson* – as Lord Reed has argued – now appears 'best understood as a decision concerned with its own specific circumstances.'<sup>111</sup>

The devolutionary context also reveals instances of Privy Council jurisprudence being of indirect influence on UK apex court decision-making.<sup>112</sup> In *Martin v HM Advocate* – in the context of discussion over the boundary between 'devolved' and 'non-devolved' matters – Lord Hope used various 'federal' cases<sup>113</sup> to outline the influence of the 'pith and substance'<sup>114</sup> doctrine on the 'background to the scheme that is now to be found in the Scotland Act.'<sup>115</sup> But Lord Hope went on to say that: '[w]hile the phrase "pith and substance" was used while [the provisions of the Scotland Act] were being debated, it does not appear in any of them. The idea had informed the statutory language, and the rules to which the courts must give effect are those laid down by the statute.'<sup>116</sup> Lord Walker was both in agreement and more forthright:

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<sup>111</sup> Lord Reed, 'Scotland's Devolved Settlement and the Role of the Courts', Dover House Lecture (27 February 2019). Cf. the dissenting judgment of Lord Kerr in *Re Northern Ireland Human Rights Commission* [2018] UKSC 27, [211]-[213].

<sup>112</sup> Lady Hale, 'Devolution and the Supreme Court – 20 Years On' (Scottish Public Law Group, Edinburgh), 14 June 2018.

<sup>113</sup> Including: *Prafulla Kumar Mukherjee v Bank of Commerce* (1947) LR 74 Indian Appeals 23; *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580.

<sup>114</sup> Lady Hale, 'Devolution and the Supreme Court – 20 Years On' (Scottish Public Law Group, Edinburgh), 14 June 2018. The 'pith and substance' doctrine holds that so long as the primary object of challenged legislation (its 'pith and substance') is deemed to fall within competence, it will not be held ultra vires by virtue of incidental impacts on issues outwith the legislature's competence (*Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580, 587).

<sup>115</sup> *Martin v HM Advocate* [2010] UKSC 10, [11]-[14].

<sup>116</sup> *Martin v HM Advocate* [2010] UKSC 10, [15].

The Scotland Act is on any view a monumental piece of constitutional legislation. Parliament established the Scottish Parliament and the Scottish Executive and undertook the challenging task of defining the legislative competence of the Scottish Parliament, while itself continuing as the sovereign legislature of the United Kingdom. That task is different from defining the division of legislative powers between one federal legislature and several provincial or state legislatures (as in Canada or Australia, whose constitutional difficulties the Judicial Committee of the Privy Council used to wrestle with, often to the dissatisfaction of those dominions). The doctrine of 'pith and substance' mentioned by Lord Hope in his judgment is probably more apt to apply to the construction of constitutions of that type.<sup>117</sup>

Both judges were keen to stress that reliance on JCPC case-law on the allocation of powers in a federal system could only be of limited use to the interpretation of the *statutory* allocation of powers under the Scotland Act.<sup>118</sup>

#### *Proportionality:*

A similar pattern can be observed in relation to the UK apex court's treatment of JCPC authorities concerning the test for proportionality. The post-HRA introduction of proportionality analysis in human rights adjudication in *R (Daly) v Secretary of State for the Home Department*<sup>119</sup> explicitly adopted the approach to proportionality mapped by the Judicial Committee of the Privy Council in *de Freitas*.<sup>120</sup> As Lord Steyn (again) noted in *Daly*:

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<sup>117</sup> *Martin v HM Advocate* [2010] UKSC 10, [44].

<sup>118</sup> A point subsequently endorsed in *Christian Institute v Lord Advocate* [2016] UKSC 51, [27]-[32].

<sup>119</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532.

<sup>120</sup> *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

The contours of the principle of proportionality are familiar. In *de Freitas*... the Privy Council adopted a three-stage test. Lord Clyde observed ... that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

‘whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.’

Given that the European Court of Human Rights had already developed an extensive proportionality jurisprudence,<sup>121</sup> the adoption of a test from the JCPC is perhaps in and of itself an interesting development. The *de Freitas* test was also utilised in *R v A (No.2)*<sup>122</sup> and was adopted by the House of Lords in the *Belmarsh* decision,<sup>123</sup> but there was cited alongside a number of Canadian decisions including *R v Oakes*<sup>124</sup> and *Libman v Attorney-General of Quebec*.<sup>125</sup> By this point in time therefore the *de Freitas* definition no longer held the monopoly on the top court’s conception of the doctrine. Since, the influence of *de Freitas* in the context

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<sup>121</sup> For a brief summary of key cases see R. Clayton, ‘Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle’ [2001] EHRLR 504, 505-507.

<sup>122</sup> *R v A (No.2)* [2002] 1 AC 45, [38].

<sup>123</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, [30].

<sup>124</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>125</sup> *Libman v Attorney-General of Quebec* (1997) 3 BHRC 269.

of Supreme Court decisions on proportionality has been somewhat diluted by the wealth of comparative authorities which have attempted to define what is argued to have become a pre-eminent pan-jurisdictional tool of constitutionalism.<sup>126</sup> As a result – while the Supreme Court continues to cite the *Daly* variant of the proportionality test<sup>127</sup> – it has also relied on decisions from common and civil law jurisdictions<sup>128</sup> in support of the more precise test to now be applied. As Lord Reed outlined in *Bank Mellat*:

The approach to proportionality adopted in our domestic law under the Human Rights Act has not generally mirrored that of the Strasbourg Court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982.<sup>129</sup>

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<sup>126</sup> See for instance: D. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004); K. Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012).

<sup>127</sup> *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39; [2014] AC 700, [20]; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355, [133].

<sup>128</sup> In particular, Germany (G. Lütke-Wolff, 'The Principle of Proportionality in the Case Law of the German Federal Constitutional Court' (2014) 34 HRLJ 12 is cited in both *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355, [134] and *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [96]). On which see: Lord Reed, 'Comparative Law in the Supreme Court of the United Kingdom', Centre for Private Law, University of Edinburgh, 13 October 2017.

<sup>129</sup> *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39; [2014] AC 700, [72].

In the same decision, Lord Sumption described *de Freitas* as containing 'the classic formulation of the test' for proportionality, but went on to say that 'although [*de Freitas*] was a milestone in the development of the law' the JCPC decision 'is now more important for the way in which it has been adapted and applied in the subsequent case law.'<sup>130</sup> Both Lords Sumption and Reed noted that the *de Freitas* test amounted to only a partial reflection of proportionality as it had subsequently been articulated by the House of Lords and Supreme Court, and that the addition of a fourth stage to the test – 'whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter' – was required in order to reflect proportionality in its contemporary iteration.

### Conclusions

The foregoing has illustrated that the wholesale adoption of constitutional reasoning from decisions of the JCPC has not been in evidence in the development of the UK apex court's domestic constitutional jurisprudence. What has been seen is an occasional – and continuing – tendency to utilise specific decisions in respect of relatively discrete legal issues, *ad hoc* reference to cases illuminating common principles and a potentially diminishing series of trends in the utilisation of broad techniques of constitutional reasoning derived from Judicial Committee decisions.

The immediate post-HRA/devolution period saw a number of judicial pronouncements likening the new constitutional arrangements to those obtaining in a system with a documentary

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<sup>130</sup> *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39; [2014] AC 700, [20]

constitution. In the, now totemic, account of the principle of legality given in *ex parte Simms*, for instance, Lord Hoffmann said the following:

... the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, [will] apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.<sup>131</sup>

Academic commentary also advanced the thesis that the constitutional changes of the late-1990s onwards had precipitated an abandonment of the *ancien regime*.<sup>132</sup> And even the more modest judicial suggestion that the constitution stood at an 'intermediate stage between parliamentary and constitutional supremacy'<sup>133</sup> might suggest the need for modes of constitutional interpretation that recognised the increasing constitutionalisation of UK's governmental order.

But movements towards constitutionalisation should not necessarily be understood as a constitutional rebirth. The UK constitution remains a composite entity.<sup>134</sup> Its components do not cohere as a 'single coherent code of fundamental law which prevails over all other sources

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<sup>131</sup> *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131-132. See also: *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151, [64]; *Jackson v Attorney-General* [2006] UKHL 56, [102].

<sup>132</sup> For instance: A. King, *Does the United Kingdom still have a constitution?* (London: Sweet and Maxwell, 2001); A. King, *The British Constitution* (Oxford: Oxford University Press, 2007); V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009).

<sup>133</sup> *International Transport Roth GmbH v Secretary of State for Transport* [2003] QB 728, [71].

<sup>134</sup> *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324, [207].



of law.'<sup>135</sup> Nor are those components reflective of the ambitions of the drafters of a documentary constitution to 'lay down an enduring scheme of government in accordance with certain moral and political values.'<sup>136</sup> The bare fact of constitutional interpretation in the post-1998 era is that is an exercise focused on the application of, and relationships between, components of the constitutional order, rather than an articulation of the order writ large. The recognition of 'constitutional statutes' is consistent with this, and speaks to the relationship between potentially conflicting statutes and other elements of the framework rather than mandating a wholesale approach to interpretation of legislation with a constitutional content and purpose.<sup>137</sup> Even though elements of the landscape – the HRA perhaps in particular – may wield something close to a pervasive influence, they too remain sub-Constitutional in the sense that they are designed to ensure that the legislature retains the ability to legislate in contravention of the protections they seek to put in place.<sup>138</sup> The doctrine of parliamentary sovereignty looms large, both as a tool of constitutional design, and also as the meta-principle governing interpretation and application of the order's component parts. As Lord Rodger recognised in *R v A (No.2)* – against this backdrop – the importation of 'Privy Council authorities should be treated with some caution since they are the product of constitutional systems which differ from that of the United Kingdom in this important respect.'<sup>139</sup>

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<sup>135</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [40].

<sup>136</sup> *Matadeen v Pointu* [1998] UKPC 9; [1999] 1 AC 98, 108.

<sup>137</sup> F. Ahmed and A. Perry, 'Constitutional Statutes' (2016) OJLS 1, 5.

<sup>138</sup> Sections 3(2)(b) and 4(6) HRA. See also s. 28(7) Scotland Act 1998.

<sup>139</sup> *R v A (No.2)* [2002] 1 AC 45, [120]. See also: *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, [64].

In this context, the importation of modes of judicial reasoning which might prompt a significant departure from the statute-focused interpretative techniques with which the common law is familiar would therefore be problematic from at least two perspectives. First, the importation of techniques of constitutional interpretation from Privy Council decisions would be susceptible to broader critiques of constitutional borrowing, namely that it is often unprincipled and methodologically imprecise, is susceptible to confirmation bias, and – in its importation of standards developed in other systems – is undermining of democratic self-government.<sup>140</sup> Second, such an approach would be undermining of parliamentary sovereignty in the sense that it would import methods of interpretation which – rather than giving effect to legislative will – seek to give effect to a broader understanding of the constitutional landscape and its purpose which is (potentially) disassociated from the specific legislation at issue. Concerns in relation to transferability of separation of powers' requirements from jurisdictions with documentary constitutions into the UK have on these grounds been longstanding.<sup>141</sup> As Lord Reed has recognised: '... decisions of courts in states with a written constitution can be as likely to mislead as to help when it comes to analysing the boundaries of common law rules developed on a case by case basis over the course of British history.'<sup>142</sup> It is for the latter reason in particular that the 'radical' approach to interpretation under the HRA and overtly 'federal' readings of the devolutionary scheme have failed to germinate in the jurisprudence of the UK's apex court. It is perhaps for a related reason that the inward migration of authorities relating to

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<sup>140</sup> V. Perju, 'Constitutional Transplants, Borrowing and Migrations' in M. Rosenfeld and A. Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), esp pp.1321-1325.

<sup>141</sup> For instance: O. Hood Phillips, 'A Constitutional Myth: Separation of Powers' (1977) 93 LQR 11.

<sup>142</sup> Lord Reed, 'Comparative Law in the Supreme Court of the United Kingdom', Centre for Private Law, University of Edinburgh, 13 October 2017.

the meaning of proportionality may be more likely to be of ongoing significance. While doctrinal readings of the standard may differ as between jurisdictions, proportionality is nonetheless viewed as a common analytical tool with cross-jurisdictional influence.<sup>143</sup> Equally, it is sufficiently disassociated from application in any specific constitution or constitutions so as to negate concerns relating to the importation of ideas from an inappropriate source.

The failure of JCPC authorities to take consistent root in the UK constitution can also be seen to be of a piece with what Stephenson has described as the Supreme Court's 'renewed interest in autochthonous constitutionalism.'<sup>144</sup> Stephenson has argued that the UK Supreme Court – in the context of disputes concerning the degrees to which external (European) human rights norms will permeate and influence the domestic order – has sought to assert 'the primacy, relevance and sufficiency of the *UK Constitution*.'<sup>145</sup> Stephenson's thesis contends that the Supreme Court's emphasis on the autochthonous state of UK constitutional law is reflective of a caution relating to the extent to which external influences might disrupt the internal, and a response to political pressures surrounding the domestic influence of the European Court of Human Rights and the Brexit-driven desire to disentangle the UK's legal order from EU norms.<sup>146</sup>

An alternative thesis might position the Supreme Court's approach in less negative terms, and instead emphasise the growing confidence and maturity of the independent Supreme Court as a constitutional organ. As that court matures, and is populated by a body of judges

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<sup>143</sup> See eg: *McCloy v New South Wales* [2015] HCA 34, [72].

<sup>144</sup> S. Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism' [2015] PL 394.

<sup>145</sup> S. Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism' [2015] PL 394, 395 (emphasis added).

<sup>146</sup> S. Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism' [2015] PL 394, 401-402.

who have worked with the UK's own breed of constitutional jurisprudence for much of their professional lives, perhaps the guiding hand of the Judicial Committee jurisprudence is needed less than it may once have seemed. On this reading, the UK constitution remains open to jurisprudential influences from elsewhere, but the distinctive character of the UK's devolutionary arrangements (ie their non-federal nature), and of the HRA (especially as a result of its clear linkage with the decisions of the European Court of Human Rights) also mean that specific transplants from elsewhere may find it difficult to fully embed in the UKSC's jurisprudence. The diminishing relevance of JCPC authorities from this perspective reflects the broader tendency for extra-jurisdictional authorities to be of transitional relevance.<sup>147</sup> In the immediate post-1998 period JCPC authorities were relied upon as a means of articulating and stabilising the requirements of the UK's new human rights and devolutionary regimes, but as a precursor (or pathway towards) to the development of a domestically-engineered constitutional jurisprudence.

Lord Bingham has argued that the JCPC's constitutional and bills of rights jurisprudence has two faces, 'one traditional or conservative, the other broader and more internationalist in outlook.'<sup>148</sup> It is arguably the case that the constitutional jurisprudence of the UK Supreme Court is developing along similar lines, maintaining a necessary focus on the distinctive statutory framework of the UK constitution, while remaining – as per the common law tradition – receptive to, though generally not driven by, extra-jurisdictional influences.

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<sup>147</sup> C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499, 523-524.

<sup>148</sup> T. Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge: Cambridge University Press, 2010), p.58.